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No. 01-1682

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LIGHTNING OIL COMPANY LIMITED,
Petitioner,

v.

HESS ENERGY INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANIEL JOSEPH *
MICHAEL L. CONVERSE
KELLY M. SKOLODA
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

* Counsel of Record

Attorneys for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

CORPORATE DISCLOSURE STATEMENT

Amerada Hess Corporation is Hess Energy Inc.'s parent corporation. Amerada Hess Corporation is the only publicly held corporation that owns 10% or more of Hess Energy Inc.'s stock.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner's statement of the case is replete with factual errors and omissions, which, when corrected, show that certiorari is utterly unwarranted. Most importantly, the petition erroneously asserts that the Fourth Circuit directed a judgment for Hess Energy as a non-moving party, cutting off petitioner's ability to respond. But Hess Energy had moved for partial summary judgment, and the federal rules (and the district court) gave petitioner the chance to respond, which it declined to do (other than asserting a narrow legal defense). The court of appeals' holding, therefore, was that the district court erred in failing to grant Hess Energy's motion for partial summary judgment. For this reason, petitioner's formulation of the question presented, *i.e.* whether a court of

appeals may *sua sponte* enter judgment for a non-moving party, has no applicability to this case. Other assertions of petitioner are similarly flawed.

COUNTER STATEMENT OF THE CASE

1. The Agreement To Purchase Natural Gas

In November 1999, respondent Hess Energy Inc. ("Hess Energy"), then known as Statoil Energy Services, Inc.,[1] and petitioner Lightning Oil Company, Ltd. ("Lightning") entered into a contract, the Master Natural Gas Purchase Agreement, under which Hess Energy agreed to purchase and Lightning agreed to sell volumes of natural gas for prices and periods to be set forth in separate letter agreements called confirmation letters. *See* Joint Appendix ("JA") at 11.[2] Between November 16, 1999, and March 7, 2000, Hess Energy and Lightning entered into seven subsequent confirmation letters. *See* JA at 18-30.

Each confirmation letter, by its terms, was subject to the Master Agreement and specified the type of transaction, the purchase period, the volumes, the price, the delivery point, and any special provisions. Under those seven confirmations Hess Energy was required to purchase and Lightning to sell specified quantities of natural gas from April 1, 2000 through March 31, 2002. Some of the confirmation letters had open price terms under which the parties either were to lock in the prices at a later date by agreement, or to allow the contract price to default to a price based on the applicable month's New York Mercantile Exchange ("NYMEX") natural gas futures contract. *See* JA at 26.

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[1] As discussed below, Statoil changed its name to Hess Energy Inc. following its acquisition by Amerada Hess Corporation.

[2] The cite "JA" refers to the Joint Appendix submitted with the briefs in the Court of Appeals.

Article XI of the Master Agreement provided that neither party could assign its rights or obligations under the contract unless it first obtained the written consent of the other party. *See* JA at 13. But the provision also contained explicit exceptions, one of which permits either party, without the other's approval, to transfer or assign the contract to "any successor, representative, or assignee" which through "purchase, merger, or consolidation" acquired ownership of the assigning party "substantially as an entirety." *Id.*[3]

2. Statoil Becomes a Subsidiary of Amerada Hess, and Lightning Continues To Conduct Business With Statoil/Hess Energy

On March 31, 2000, Amerada Hess Corporation purchased all of the outstanding stock of Statoil from Statoil's parent company. *See* JA at 76. Shortly thereafter, Statoil changed its name to Hess Energy Inc. *See id.* Lightning knew of Amerada Hess's purchase of Statoil, and knew that Amerada Hess was now providing administrative services on behalf of Hess Energy. *See* JA at 178. Lightning continued to do business with Hess Energy for several weeks following Amerada Hess' purchase, continuing to deliver natural gas to Hess Energy, while sending invoices to and accepting payment from Amerada Hess for the gas that it was delivering to Hess Energy. *See* JA at 127-128.

By late May 2000 natural gas prices had risen substantially above the levels at which Lightning and Hess Energy had already, through their confirmation letters, locked in prices for the gas that Lightning was to deliver through October

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[3] Article XI of the Master Agreement provides that "either Party may without the consent of the other Party (and without relieving itself from liability hereunder), . . . (ii) transfer or assign this Agreement to any successor, representative or assignee which shall succeed by purchase, merger or consolidation to the properties, substantially as an entirety, of Seller or Buyer, as the case may be." *See* JA at 14.

2001. On May 26, 2001, Lightning's President contacted Hess Energy seeking to lock in these higher prices for natural gas that was to be delivered between October 2001 and March 2002. *See* JA at 163 and 181. (Lightning and Hess Energy had already entered into confirmations for natural gas for these months but the price for those months remained open.) Although Hess Energy offered Lightning a floor price of $3.75 per MMBtu (million British thermal units), Hess Energy was unwilling to lock in higher prices that far in advance. *See* JA at 134.

3. Lightning Secretly Seeks Another Buyer For A Substantially Higher Price

Having failed to obtain Hess Energy's agreement to lock in higher prices, Lightning then negotiated a contract with another company, National Fuel Resources, under which Lightning agreed to sell to National Fuel Resources the gas that Lightning had already committed to Hess Energy. Lightning signed that contract on June 7, 2000, *see* JA at 136, and on June 23, 2000, agreed on a price of $3.96 per decatherm (Dth) for 80,000 decatherms of natural gas per month from July 2000 to March 2002.[4] *See* JA at 136-147. That price was substantially higher than the price Lightning was getting from Hess Energy. *See* JA at 17, 25. Lightning acknowledged that its motivation in selling the gas to National Fuel Resources was simply to get a better price than Hess Energy was paying. *See* JA at 280-81. Although Lightning shortly thereafter ceased delivering natural gas to Hess Energy, it failed to inform Hess Energy until several weeks later (nor did Hess Energy immediately notice because of the way that deliveries of natural gas were typically handled on the applicable pipeline, an affiliate of National Fuel Resources). Lightning's delay was intended to permit

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[4] One decatherm is equivalent to one MMBtu. *See* Williams & Meyers, *Manual of Oil and Gas Terms*, 255 (11th ed. 2000).

Lightning to send invoices to Amerada Hess, and receive payment for the gas that had already been delivered before Hess Energy discovered that Lightning ceased performing under the contract.[5]

4. Lightning Falsely Backdated its Termination Notice to Hess Energy by Seven Weeks

It was not until July 26, 2000, one week after Amerada Hess paid Lightning's July invoice, and nearly seven weeks after Lightning had signed the contract with National Fuel Resources, that Hess Energy received a letter from Lightning purporting to terminate their agreement effective June 30. *See* JA at 32. Although this letter purports to be dated June 7, 2000, the same day Lightning entered into the new contract with National Fuel Resources, it was not postmarked until July 25, 2000.[6] *See* JA at 33.

As a pretext for its termination, Lightning alleged that Hess Energy had improperly assigned the Master Agreement to Amerada Hess without Lightning's consent. On August 1, 2000, Hess Energy responded, informing Lightning that it had not assigned the Master Agreement and that the contract was still in force. *See* JA at 35. On the next day, Lightning directed National Fuel Gas Supply Corporation, the pipeline company responsible for delivering Lightning's gas to Hess Energy, to remove Hess Energy's meters and terminate its

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[5] For example, Lightning submitted its June invoice (for the natural gas it delivered in May 2000) on June 12, 2000, and Amerada Hess paid that invoice on June 19, 2000. *See* JA at 129-130. Likewise, Lightning submitted its July invoice (for gas delivered in June) on July 11, 2000 and Amerada Hess paid it on July 19, 2000. *See* JA at 131-132.

[6] The termination letter was either prepared on June 7 but not mailed for seven weeks, or was prepared on a later date than the date placed on the letter. Either way the letter falsely implies that Hess Energy got notice on or near June 7.

supply service to Hess Energy. *See* JA at 38. On August 3, 2000, Hess Energy notified Lightning that it was in breach of the Master Agreement. *See* JA at 150.

5. The Proceedings Below

Hess Energy filed the present action against Lightning alleging breach of contract five days later. *See* JA at 1. Lightning asserted in its Answer that its termination of the contract was excused by Hess Energy's alleged assignment of the agreement to Amerada Hess, Hess Energy's parent company, without Lightning's consent and in asserted violation of the terms of the contract.[7] *See* JA at 39.

In October 2000, Hess Energy moved for partial summary judgment on the issue of Lightning's liability for breach of contract. Hess Energy argued that Lightning's Answer had admitted the *prima facie* elements of its breach of contract claim and that no assignment forbidden by the contract had occurred. Lightning filed a cross motion for summary judgment claiming that Hess Energy had improperly assigned the contract to Amerada Hess. In response to Lightning's cross motion, Hess Energy argued that even if it had breached the Master Agreement by assigning the contract to Amerada Hess, any such breach was not a material breach that justified Lightning's termination of the contract.

At a hearing on the parties' cross motions, the district court questioned Lightning's counsel about Hess Energy's argument that any breach of the assignment clause was immaterial and would not have justified Lightning's termination. *See* Opposition Appendix ("Opp. Ap.") at 2a-4a. Because Hess

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[7] Lightning's Statement of the Case falsely claims that its Answer "pleaded several independent and legally discrete affirmative defenses." *See* Petition at 5. In truth, other than a defense to Hess Energy's damages claim, Lightning's Answer included only a single affirmative defense, although pled in four separate defenses, each with a slightly different rationale, *i.e.*, that Hess Energy's breach of the assignment limitation clause justified its repudiation of the contract. *See* JA at 39-41.

Energy's argument that any breach was not material was raised in its opposition to Lightning's cross motion, and as an alternative argument in support of its own motion, the district court asked Lightning's counsel whether Lightning needed additional time to respond to that argument. *See id.* Lightning's counsel declined the offer, asserting that the district court could dispose of the materiality issue as a matter of law. *See id.* Nevertheless, the district court ordered Lightning to submit an additional brief addressing Hess Energy's argument that any breach was immaterial and would not have excused Lightning's performance (and gave Hess Energy an opportunity to respond to Lightning's supplemental brief). *See* Op. App. at 6a-7a.

Following that additional briefing, the district court denied both the cross motions for summary judgment, *see* JA at 43, holding that the material breach rule was inapplicable to this contract. Lightning later renewed its motion for summary judgment, which the district court granted, finding that Hess Energy had delegated its contractual responsibilities to Amerada Hess in violation of the contract, *see* JA at 59, justifying Lightning's termination.

On appeal the Fourth Circuit reversed. It held that the district court had erred in both its grant of Lightning's summary judgment motion and in its denial of Hess Energy's summary judgment motion. The court of appeals held that even if a breach had occurred, it had been non-material and thus did not justify cancellation—just the argument that Hess Energy had made to the district court. The court of appeals also noted that the district court had likely been too hasty in holding that a breach had occurred, though it was not necessary to decide this point. Since Lightning had otherwise admitted all the elements of Hess Energy's breach of contract claim, the court of appeals held that Hess Energy had established Lightning's liability for breach and remanded for a trial on damages only.

THE PETITION SHOULD BE DENIED

The petitioner's argument that the court of appeals failed to apply correctly the procedural rules governing review of summary judgment determinations is based on flawed and mis-stated facts. Moreover, the petition seeks review of the court of appeals' interpretation of a straightforward issue of state contract law that neither presents an issue of importance nor involves a split of authority among the federal or state appellate courts. Therefore certiorari is not warranted.

I. THE COURT OF APPEALS PROPERLY REVERSED THE DISTRICT COURT'S DENIAL OF HESS ENERGY'S SUMMARY JUDGMENT MOTION

The first question presented by the petition is based on a fundamental misstatement of the proceedings below.

A. The Court of Appeals Did Not *Sua Sponte* Enter Judgment for Hess Energy

Petitioner asserts that the court of appeals deprived it of an opportunity to present its affirmative defenses by *sua sponte* entering summary judgment for Hess Energy as a non-moving party. Petitioner is simply, and grossly, mistaken. Hess Energy did move for summary judgment on the issue of Lightning's liability for breach of contract (as Lightning's statement of the case somewhat inexplicably acknowledges). *See* Petition at 5-6. Petitioner seems oblivious to the fact that Hess Energy appealed the district court's denial of Hess Energy's own motion along with its appeal of the district court's subsequent grant of Lightning's own renewed summary judgment motion.

Lightning's sole substantive defense to Hess Energy's claim was its assertion that Hess Energy had assigned the contract in violation of the clause limiting assignments and that this excused Lightning's non-performance. Hess Energy argued two points in response: first, that any assignment that

may have occurred fell within one of the two exceptions contained in the contract clause limiting assignment, and second, in the alternative, that even if an assignment did violate the assignment limitation clause, any such breach was non-material and would not have justified Lightning' repudiation of the contract.

In denying Hess Energy's summary judgment motion, the district court held that it need not decide whether any assignment in violation of the assignment limitation clause was material because, it held, the material breach rule did not apply to this contract. *See* Pet. App. A-34 ("The [material breach] rule, however, is inapplicable to this case . . ."). Thus, Lightning is simply wrong in claiming (petition at 6) that the district court ruled that any breach of the assignment limitation clause was material *per se*.

On appeal, Hess Energy challenged both the district court's granting Lightning's renewed summary judgment motion as well as the district court's earlier denial of Hess Energy's summary judgment motion. The court of appeals held that the district court had erred in both rulings. With respect to the materiality issue, the court held that "even if Lightning could establish that there was an improper assignment, termination would be justified only if the assignment resulted in a breach that was material." Pet. App. A-7. In support of that proposition, the court of appeals relied on the material breach rule that had long since been adopted by the Virginia Supreme Court. *See id.*

Thus, because Hess Energy did move for summary judgment, and because the Fourth Circuit held that the district court erred in denying that motion, it is simply incorrect to claim, as Lightning does in this petition, that the Court of

Appeals entered judgment *sua sponte* for Hess Energy as a non-moving party.[8]

B. Lightning Waived Its Opportunity To Assert Facts Showing that Any Breach was Material

Petitioner is also incorrect that it did not have the opportunity to assert facts showing that the claimed breach was material. The district court explicitly gave it that opportunity, which it declined. Moreover, a party opposing summary judgment must assert every factual and legal basis on which it opposes summary judgment. *See Liberles v. Cook County*, 709 F.2d 1122 (7th Cir. 1983). As the Seventh Circuit there explained, "[i]t is a well settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal." *Id.* at 1126. *See also* Rule 56(e), Fed. R. Civ. Proc. Thus, faced with Hess Energy's motion for summary judgment and supporting assertion that any breach of the assignment clause was immaterial and accordingly could not have justified Lightning's non-performance, Lightning was obligated to make every available legal and factual argument in opposition to Hess Energy's motion. In particular if Lightning believed that there was a disputed issue of fact as to whether any breach by Hess Energy was material, Lightning was required to make that showing in its summary judgment opposi-

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[8] The court of appeals' ruling would have been no less appropriate if Hess Energy had not moved for summary judgment since an appellate court clearly has the authority to grant summary judgment to non moving parties in appropriate cases. *See, e.g., Fabric v. Provident Life & Accident Ins. Co.*, 115 F.3d 908, 914-15 (11th Cir. 1997) ("the power of an appellate court to order summary judgment for a party who did not move for it in the district court has been widely recognized" where the party against whom judgment is ordered has had a fair opportunity to dispute facts pertinent to the issue)

tion, even if it also believed, as it asserted in the district court, that Hess Energy's materiality argument was legally unsupportable.

But in response to Hess Energy's motion Lightning chose to make only a legal argument, *i.e.* that the materiality of any breach was legally irrelevant. Lightning made no attempt to assert any fact to support an assertion that Hess Energy's alleged breach was material. Both during the hearing on the parties' motion for summary judgment, as well as in the supplemental briefs that the district court specifically requested to address the materiality issue, Lightning clung to this simple legal argument that the materiality of any breach was legally irrelevant. Thus Lightning deliberately passed up its explicit chance to show why the claimed breach was material, and it cannot resurrect that opportunity now.

We note finally that petitioner did not in the court of appeals and even now does not attempt to identify any facts that might lead a reasonable jury to conclude that the breach it claims Hess Energy committed had any material impact.[9] The implication that there are no such facts is inescapable.[10]

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[9] Even if an assignment of the contract by Hess Energy to its parent Amerada Hess Corporation had occurred, it is difficult to understand, and Lightning never offered any explanation, how this could have injured Lightning, the seller of gas under the contract. Moreover to the extent that Lightning asserts that it needed discovery to develop those facts, this assertion rings hollow, as any material negative effect would be on Lightning, which it would not need discovery to be able to discern. In any event, however, if Lightning really needed discovery to respond to Hess Energy's motion for partial summary judgment, it could and should have availed itself of the provisions of Rule 56(f), Fed. R. Civ. Proc., which allows the respondent to a motion delay in appropriate situations to obtain necessary discovery.

[10] Because the court of appeals' reversal of the district court's denial of Hess Energy's summary judgment motion, and its order directing entry of judgment for Hess Energy on its liability claim, were entirely appropriate, Lightning's argument that it has been deprived of due process or the right to jury trial is insubstantial.

II. THE COURT OF APPEALS APPLIED ESTABLISHED STATE CONTRACT LAW PRINCIPLES IN DECIDING HESS ENERGY'S APPEAL

The petition's second question likewise lacks any accurate factual premise. The court of appeals' principal holding, that only a material breach by Hess Energy of the assignment limitation clause would have justified Lightning's termination of the contract, was based squarely on the Virginia Supreme Court's opinion in *Neely v. White*, 177 Va. 358, 14 S.E.2d 337, 341 (Va. 1941) applying the material breach rule. Other federal courts sitting in diversity have likewise followed the *Neely* court's holding. *See R. W. Power Partners v. Virginia Electric Power Co.*, 899 F. Supp. 1490 (E.D. Va. 1995). *Neely* clearly supports the court of appeals' result, and in any event the assertion that the court's holding does not flow from *Neely*, and that Virginia law is unsettled, even if arguable, is strictly a question of state law and does not warrant certiorari

CONCLUSION

For all of the above stated reasons, Hess Energy respectfully requests that this Court deny the petition for certiorari.

Respectfully submitted,

DANIEL JOSEPH *
MICHAEL L. CONVERSE
KELLY M. SKOLODA
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

* Counsel of Record

Attorneys for Respondent

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CA 00-1347-A

HESS ENERGY, INC.
Plaintiff,

v.

LIGHTNING OIL COMPANY, LTD.,
Defendant.

MOTION HEARING

October 13, 2000

Before: James C. Cacheris, Judge

PROCEEDINGS

[3] MR. YAMAMOTO: Good morning, Your Honor. Alan Yamamoto and Joseph Altomare for Lightning Oil.

THE COURT: Good morning.

MR. PIERCE: Good morning, Your Honor. Anthony Pierce on behalf of Hess Energy.

THE COURT: Good morning.

MR. PIERCE: And with me is one of our business people, Ben Hadden (phonetic).

THE COURT: Glad to have him with us this morning.

MR. PIERCE: Your Honor, we are here on this morning on Hess Energy's motion for summary judgment, which I think is—I know the Court is familiar with the pleadings, and it's quite simple.

Hess Energy contracted with Lightning to buy a certain amount of gas. Lightning—

THE COURT: And you claim because they got a better—gas prices went up, they claim a breach and went and got somebody else to buy their gas at a higher price?

MR. PIERCE: I think in essence, Your Honor, that's correct.

They saw the price of gas skyrocketing.

* * * *

[14] the trier of fact.

THE COURT: I think Mr. Pierce concedes this issue is for the trier of fact, the assignment, did he not?

MR. ALTOMARE: He is saying there is an issue of fact, I think.

THE COURT: Yes.

MR. ALTOMARE: And what we are proposing in our cross motion is that there isn't one; there is no reason for the Court to try this case; that there was an assignment.

And as a matter of law, whether or not Amerada Hess denies the—or rather whether or not Hess Energy denies the assignment in the affidavit, that's not inconsistent with the fact that the—that rights under the contract are de facto being enjoyed by Amerada Hess.

There is—I received, Your Honor, the reply brief just, I guess, a couple of days ago, and I had to be in transit yesterday to be here.

I haven't had an opportunity to file my reply to the—

THE COURT: When do you want to file it by?

MR. ALTOMARE: I don't think I need to.

[15] If the Court would permit me to submit in lieu of a reply a photocopy of a restatement of contract, Section 322. Because what--something concerned me—and I want to be candid with the Court.

Something concerned me in the reply brief, and that is the reference in that brief to the issue as to whether or not, with respect to our cross motion, we are entitled to terminate the contract, or whether we are just entitled to damages if we choose to sue.

What was not explained in the reply brief is that Section 322 of the restatement makes the distinction between the delegation of duties, which it says is barred without more, and the delegation of rights.

In this case, we have a bilateral executory unperformed portion of the agreement, and there is considerable performance that is required on both sides of this transaction.

Under Section 322, the remaining performance by Hess is barred by the—if the Court finds an assignment, then the assignment is barred. And if the assignment is barred, then we are entitled to terminate the contract.

[16] Secondly, with respect to materiality—and understanding of the situation I think is important. And that as we set out in our brief, this isn't—this isn't a contract to provide and purchase a fungible item.

The commodity is fungible, but the facilities—and the critical investment on the facility—on the facilities that produce—the facilities to make it are far from fungible. They are unique. They are in place at a particular point on the earth.

And because of that—and it is because of that, that is mainly why the parties have that anti-assignment clause in this agreement.

I wanted to be sure that if one of them assigned the contract, those assets, those facilities would be transferred to the other party.

On the basis of the pure parsing of the language in the agreement, I don't see how the language in the agreement could be any clearer that the assignment is not only barred, but that it involves the delegation of duties which is what—which is barred and gives rise to the termination.

THE COURT: This is as good as it gets.

There is not going to be any more [17] discovery from what Mr. Pierce says.

And what you are saying.

MR. ALTOMARE: If the Court determines that the assignability turns on whether or not there has been an assignment is an issue of fact, based on the record, then obviously we would want the opportunity to take discovery on that issue.

We are here to argue—

THE COURT: Mr. Pierce argues that it is—that it's a triable issue of fact.

MR. ALTOMARE: We are here today—

THE COURT: And you position is—

MR. ALTOMARE: It is not.

THE COURT: It is a nonissue?

MR. ALTOMARE: It is not necessary.

Are there any other open issues that the Court would like me to address?

THE COURT: Thank you. Okay.

Mr. Pierce, what about Eisenhower's affidavit that was submitted in response, submitted in support of the preliminary injunction and has not been resubmitted in terms of a motion for summary judgment after these three letters surfaced?

MR. PIERCE: Your Honor, I think we cited

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Filed Oct. 23, 2000]

Case No. CV-00-1347-A

HESS ENERGY INC.,

Plaintiff,

v.

LIGHTENING OIL CO., LTD.,

Defendant.

ORDER

WHEREAS, this Court has taken Plaintiff's motion for partial summary judgment and Defendant's cross-motion for summary judgment under advisement, it is hereby Ordered that:

1) Both Parties shall submit further briefing on whether a violation of the assignment clause (Article XI of the Master Agreement) constitutes a material or non-material breach of the contract;

2) Defendant shall have ten days to submit a Reply to the issue raised in Section I.E. of Plaintiff's Reply and Opposition to Defendant's Cross Motion for Summary Judgment;

3) Plaintiff shall have ten days from the date of the filing of Defendant's Reply to submit a response.

4) The Clerk shall forward copies of this ORDER to all counsel of record.

/s/ James C. Cacheris
JAMES C. CACHERIS
UNITED STATES DISTRICT COURT JUDGE

October 23rd, 2000
Alexandria, Virginia